Supreme Court, U.S.
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No. 08-595

In The

Supreme Court of The United States

MONROE YALE MANN,

Petitioner,

- against -

BERNARD ABEL RICHARD ABEL
JANANNE ABEL and WESTMORE
NEWS, INC.

Respondents.

Petition for a Writ of Certiorari to the New York Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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Introductory Statement:

This is a first amendment free speech libel case, on appeal from the highest court in the state of New York, the New York Court of Appeals.

Questions Presented for Review:

A. Under what set of facts and conditions will the First Amendment freedom of press and speech not be protected by the courts due to malicious publication of lies and false conclusions reaching the tort of libel without any basis whatsoever in fact?

B. One has a right to his own opinion, but not to his own facts; should a newspaper be permitted to wantonly and brazenly make libelous statements about an upstanding citizen and professional without punishment or reprimand?

Parties to the Proceeding: All parties to the proceeding in this Court appear on the front cover of this petition.

Corporate Disclosure Statement: There is no parent or publicly held company owning 10% or more of the corporation's stock.

TABLE OF CONTENTS

Page

Introductory Statement i

Questions Presented for Review i

Parties to the Proceeding ii

Corporate Disclosure Statement ii

Table of Authorities v

Petition:

Petition for a Writ of Certiori 1

Opinions Below 1

Jurisdiction 1

Constitutional and Treaty Provisions Involved 1

Statement of the Case 2

Reasons for Granting the Writ 4

Appendix:

Judgment – NY Court of Appeals 1a

Judgment – NY Appellate Division,
Second Department 7a

Jury Findings of Fact – Supreme Court
of the State of NY, County of Westchester . 10a

Transcript of Original Article,
Westmore News, Friday, August 22, 2003 ... 15a

Transcript of Subsequent Article,
Westmore News, Friday,
March 28, 2008 ..... 18a

Table of Authorities

600 W. 115th St Corp v. Von Gutfeld,
80 N.Y.2d 130, 589 N.Y.S.2d 8
25, 603 N.E.2d 930, *cert denied* 508 U.S. 910
113 S.Ct 2341 8

Brian v. Richardson, 87 N.Y.2d 46,
637 N.Y.2d 347 8

Brooklyn Law School v. Aetna Case &
Surey Co., 661 F.Supp. 445, 849 F.2d 788 11

Burmeister v. DeLucia, 263 N.Y. 315 15

Carolco Pictures, Inc. v. Sirota,
700 F.Supp. 169 13

Chapadeau v. Utica Observer-Dispatch,
Inc., 38 N.Y.2d 196, 379 N.Y.S.2d 61,
341 N.E.2d 569 6,14

Crane v. New York World Telegram Corp.,
308 N.Y. 470, 126 N.E.2d 753 15

Gjonkekaj v. Sot, 308 A.D.2d 278 6

Graham v. Murphy, 135 A.D.2d 326,
525 N.Y.S.2d 414 [1981] 7

Grass v. News Group Publications, Inc.,
570 F.Supp. 178 12

Grieco v. Galasso, 297 A.D.2d 659,
747 N.Y.S.2d 120 15

Gross v. New York Times Co.,
603 N.Y.S.2d 813, 623 N.E.2d 1163 ..... 8, 9,15

Held v. Pokorny, 583 F.Supp. 1038 12

Howlett v. Bloom, 239 A.D.2d 389, 390,
657 N.Y.S.2d 433 8

Iannoccone v. 21st Century MRI, P.C.,
8 A.D.3d 233 15

Immuno A.G. v. Moor-Jankowski,
566 N.Y.S.2d 1270 8,9

Kamalian v. Reader's Digest Association Inc.
29 A.D.3d 527 7

Liebgold v. Hofstra University,
245 A.D.2d 272 6

Lolik v. Big V Supermarkets,
86 N.Y.2d 744 15

McManus v. MaCarthy, 686 F.Supp. 302 12

Milkovich v. Lorain Journal Co.,
497 U.S. 1 4,9

Reeves v. American Broadcasting
Companies, Inc., 580 F.Supp. 84,
aff'd 719 F.2d 602 12

Smetanick v. Erie Insurance Group,
16 A.D.2d 957, 792 N.Y.2d 223 7

Steinhilber v. Alphonse,
508 N.Y.S.2d 901, 501 N.E.2d 550 7,8,9

Sullivan v. New York Times,
376 U.S. 254, 84 S.Ct. 710 5

Taylor v. Spader, 48 N.Y. 664 15

Trump v. Chicago Tribune Co.,
616 F.Supp. 1424 12

Udell v. New York News, Inc.,
507 N.Y.S.2d 904, 124 A.D.2d 656 13

Willover v. Martha Hill, 72 N.Y. 36 [1878] ... 14

PETITION

PETITION FOR A WRIT OF CERTIORARI

Petitioner Monroe Mann respectfully petitions for a writ of certiorari to review the judgment of the New York Court of Appeals.

OPINIONS BELOW

The opinion and judgment of the jury of the New York Supreme Court in Petitioner's favor is not reported. The opinion and judgment of the New York Appellate Division upholding the jury verdict (with qualifications) is reported at 37 A.D.3d 778, 830 N.Y.S.2d 586, 2007 N.Y. Slip Op. 01694. The opinion and judgment of the New York Court of Appeals (reversing the judgment of the Appellate Division) is reported at 10 N.Y.3d 271, 885 N.E.2d 884, 856 N.Y.S.2d 31, 36 Media L. Rep. 2106, 2008 N.Y. Slip Op. 02675.

JURISDICTION

The New York Court of Appeals—the highest court in the State of New York—rendered judgment on March 25, 2008. The United State Supreme Court has jurisdiction pursuant to the 1st Amendment to the Constitution of the United States of America. This court is the ultimate arbiter on all Constitutional issues.

CONSTITUTIONAL AND TREATY PROVISIONS INVOLVED

The 1st Amendment to the Constitution of the United States of America provides in part that "Congress shall make no law abridging the freedom of speech, or of the press.

STATEMENT OF THE CASE

A. Factual Background

On the 22nd day of August, 2003, the defendant Bernard Abel, along with the publisher, Richard Abel, and Editor Jananne Abel, published and circulated in the Westmore News, in a weekly article entitled, The Town Crier and, upon information and belief, the individual defendants participated in the preparation and publication of a false, defamatory, malicious, and libelous article of and concerning the plaintiff, a copy of which is attached hereto, which article contains *inter alia* the following matter, to wit:

> Mann had been a Republican, but jumped ship. He is now a Democrat. Why?
> When Mann was on the Port Chester School Board, he was the one most instrumental in kicking out the Blind Brook School District kids from Port Chester High School. He did that just before the school year started. At the last minute, the Blind Brook students were bussed to Valhalla High School. For the following few class years, the students were bussed to Mamaroneck High School. Finally, after Mann actions, the Blind Brook school district built its own high school.
>
> Before Mann power play, the Blind Brook School District had been sending its students on tuition to Port Chester High School for over 70 years. It took the Port Chester School System over ten years to recover from Mann destructive actions.

> Will Rye town ever recover from Monroe Mann? Is the power behind Morabito thrown leading the Town of Rye to destruction. I think it is.

At the time of the aforesaid publications, the defendants actuated by actual malice in that the defendants knew that the articles and matters contained therein, concerning the plaintiff, so published, were false and untrue, or were published with reckless and wanton disregard of whether they were false and untrue. (Mann was on School Board from 1967 to 1972, some 36 years ago.)

As a result of the publication and the acts of the defendants in connection therewith, the plaintiff has been held up to public contempt, ridicule, disgrace, and prejudice; has suffered great mental pain and anguish; and has been irreparably injured in his good name, business reputation, and social standing, and has lost the esteem and respect of friends, acquaintances, and business associates.

Further, three days after the NY Court of Appeals reached its verdict, defendant maliciously and intentionally defamed the plaintiff further, on March 28th, 2008, by reprinting ord for word he entire article in question in the Westmore News newspaper. If defendant did not know the purported facts he published in the original article were untrue before this action was brought by plaintiff, defendant certainly knew that his acts were untrue and nonexistent after this action. By republishing the entire original article after it became clear that many of the acts asserted by defendant were non-existent, and indeed, false, it is clear now that defendant did indeed act with malice, and did indeed act with complete and reckless disregard for the truth in an effort to further injure plaintiff

reputation in the community.

B. Proceedings Below

On August 22, 2003, Defendant-Respondent (Respondent) published an article in the Port Chester Westmore News, the contents of which are the issue in this petition. Plaintiff-Petitioner (Petitioner) filed a complaint against Respondent in the New York Supreme Court of Westchester County, a court of competent jurisdiction. Respondent replied with a motion to dismiss, which was denied. The case proceeded to a jury trial which found Respondent guilty of libel; the jury rendered a judgment in Petitioner favor. Upon Respondent appeal, the New York Appellate Division affirmed the jury verdict with modification. Upon a final appeal by Respondent to the New York Court of Appeals, the verdict of the jury, and the intermediate court, were reversed. Neither at trial or on either appeal was any affirmative defenses presented by Respondent.

REASONS FOR GRANTING THE PETITION

THE NEW YORK COURT OF APPEALS IS IN ERROR BECAUSE ITS DECISION IN THIS CASE VIOLATES THE UNITED STATES CONSTITUTION, AND THE 1st AMENDMENT DECISIONS OF THE UNITED STATES SUPREME COURT. AN INDIVIDUAL IS ENTITLED TO HIS OWN OPINION, BUT NOT ENTITLED TO INVENT HIS OWN NON-EXISTENT FACTS

According to *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, plaintiffs may go forward with defamation claims when statements sounding like opinions could be

objectively verified. Defendant Bernard Abel in the case at bar had every opportunity to verify his statements prior to publication, at trial, and prior to republication, but decided not to. No affirmative defenses were submitted by defendants in their answer to the complaint, or at trial.

As supported by the official record, the allegations of defendants were knowingly false and made with reckless disregard for the truth; nobody was ussed t the last minute the students from the 9th grade were accepted into the tenth grade and all students were permitted to remain until graduation; there was no power play; and Mann was a Republican until 1991, and then became a registered Conservative from then until the present t no time during the dates in question was Mann ever a Democrat. The article was written and published with actual malice, that is, with knowledge that it was false or with reckless disregard of whether it was false or not, as set forth in *Sullivan v. New York Times,* 376 U.S. 254, 84 S.Ct. 710. Not one fact was submitted by defendants in support of their article, either in the NY Supreme Court, The Appellate Division of NY, or the NY Court of Appeals, *or* upon malicious republication of the original article on March 28th, 2008, three days after the final ruling of the NY Court of Appeals.

The jury considered all these issues. The article complained of was knowingly false and defamatory; the true facts were easily accessible if defendants had taken the trouble to inquire, and the school records of 40 years ago and witness testimonies on the stand demonstrate the falsity of their article.

The defendants did not submit any witnesses at the trial, or any evidence, to substantiate their false accusations. There was no proof sufficient to establish a defense, either on their motions, on their previous

appeals to the Appellate Division, or the jury at the trial.

Defendants never raised any issue in the lower Court regarding any defense, or any defense under the Constitution, either in their papers or at trial. Their counsel never made any objection to the verdict of the jury, and nothing was preserved.

Plaintiff is a well-known and respected attorney, a current member of the National Defense Executive Reserve, Department of Homeland Security, having recently been awarded distinction by the Department for his 20 years of service; he is also in private practice in the area where defendants publish their newspaper, and these false, reckless allegations made by defendants are libel per se.

As stated in *Chapadeau v. Utica Observer-Dispatch, Inc.*, 38 N.Y.2d 196, 379 N.Y.S.2d 61, 341 N.E.2d 569, he publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. Further, the case of *Gjonkekaj v. Sot,* 308 A.D.2d 278, states that the publication, ends to expose the plaintiff to public contempt, ridicule, aversion or disgrace, or induce an evil opinion of him in the minds of right-thinking persons, and to deprive him of their friendly intercourse in society. Defendant sole purpose was exactly that, and that is exactly the result the defendant obtained.

The publication was not an editorial; it was an article written setting forth clear, material acts which the author intended to present to the public as factual, when in fact they were libelous and defamatory, while claiming to be factual, and was, as defendant quoted from *Liebgold v. Hofstra University,* 245 A.D.2d 272, easonably susceptible to a defamatory connotation. The defendants cannot now claim that these statements,

which they submitted as factually truthful, were now the ditorial opinions of the author The jury has heard all the evidence and made its determination, as did the Appellate Division. The NY Court of Appeals incorrectly ruled that because it was olitical opinion it was protected; they ignored the fact that defendants had absolutely no facts to justify their opinion.

The School District Records demonstrated the falsity of the statements; no one was ever kicked out, nor bussed at the last minute; the record at trial showed that there were absolutely no facts to substantiate any of the defendants statements; the Superintendent of Schools produced the Records and testified that defendant statements were untrue.

Defendants failed to move in the lower Court to set aside the jury verdict and failed to preserve their challenge. In the case of *Smetanick v. Erie Insurance Group*, 16 A.D.2d 957, 792 N.Y.S.2d 223, The Court stated: . .plaintiffs failed to preserve their challenge to the amount of the jury award inasmuch as they did not move to set aside the verdict (see CPLR 4017, 4404{a}; *Graham v. Murphy*, 135 A.D.2d 326, 525 N.Y.S.2d 414 [1981]). Defendants having made no motion to set aside the jury verdict, and the jury having spoken and reached its decision, the appeal to the Appellate Division and the Court of Appeals was without merit.

The New York Courts, in a recent decision from the Appellate Division, Second Department, *Kamalian v. Reader Digest Association, Inc.*, 29 A.D.3d 527, stated in part:

> . . . A pure opinion is a statement of opinion which is accompanied by a recitation of the facts upon which it is based or does not imply that it is based upon undisclosed facts *(see Steinhilber v.*

> *Alphonse,* 508 N.Y..S.2d 901, 501 N.E.2d 550; *Howlett v. Bloom*, 239 A.D.2d 389, 390, 657 N.Y.S.2d 433). The expressions of opinion in the article were adequately supported by a recitation of the facts upon which they were based, and did not imply that they were based on undisclosed facts.
>
> . .
>
> Here, there were no true facts submitted by defendants, and what they submitted was false and contrived, as the jury found.

In *Brian v. Richardson,* 87 N.Y.2d 46, 637 N.Y.2d 347, the New York Court of Appeals stated, quite clearly:

> The law governing defamation actions involving communications purporting to convey opinion has been explored in a quartet of recent Court of Appeals decisions (*Gross v. New York Times Co.,* 603 N.Y.S.2d 813, 623 N.E.2d 1163; *600W. 115th St St. Corp. v. Von Gutfeld*, 80 N.Y.2d 130, 589 N.Y..S.2d 825, 603 N.E.2d 930, *cert. denied* 508 U.S. 910, 113 S.Ct. 2341,124 L.Ed.2d 252; *Immuno A.G, v. Moor-Jankowski,* 566 N.Y.S.2d 1270; *Steinhilber v. Alphonse,* 68 N.Y.2d 283, 508 N.Y.S.2d 901, 501 N.E.2d 550).1 The essence of the tort of libel is the publication of a statement about an individual that is both false and defamatory. Since falsity is a *sine quo non* of a libel claim and since only assertions of fact are capable of being proven false, we have consistently held that a libel action cannot be maintained unless it is premised on publications assertions of *fact* [sic][sic]

> (*Gross v. New York Times Co., supra,* at 152-153, 603 N.Y.S.2d 813, 623 N.E.2d 1163; *Milkovich v. Lorain Journal Co.,* 497 U.S. 1, 17-21, 110 S.Ct. 2195, 2704-2707, 111 L.ed.2d 1).
>
> . . . the court should look to the over-all context in which the assertions were made and determine on that basis hether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff (*id*, at 254, 566 N.Y.S.2d 906, 567 N.E.2d 1270, citing *Steinhilber v. Allphonse, supra*, at 293, 508 N.Y.S.2d 901, 501 N.E.2d 550).

The Court also stated:

> We emphasize that an article appearance in the sections of a newspaper that are usually dedicated to opinion does not automatically insulate the author from liability for defamation. Despite our firm commitment to encouraging the robust dissemination of ideas through these and similar media, we have never suggested that an editorial page of a newspaper column confers a license to make false factual accusations and thereby unjustly destroy individual reputations (*see, e.g., Immuno AG. V. Moor-Jankjowski, supra,* at 254, 566 N.Y.S.2d 1270). To the contrary we have repeatedly emphasized that the forum in which a statement has been made, as well as the other surrounding circumstances comprising the

> `broader social setting, are only useful gauges for determining whether a reasonable reader or listener would understand the complained of assertions as opinion or statements of fact.

Here, there was no icense to make false factual accusations and thereby unjustly destroy individuals reputations as the defendants have done, and as both the lower court and the jury, and the Appellate Division have found to have occurred.

Here, as stated, the own Crier is supposed to report facts, not opinions, and his statements were actionable assertions of non-existent facts and were supposedly made after actual knowledge of facts when in fact the statements were false and contrived and made in reckless disregard of the truth and with knowledge of their falsity. In the *Immuno* case, *supra*, the New York Court of Appeals stated, in part: he key inquiry is whether challenged expressionism, however labeled by defendant, would reasonably appear to state or imply assertions of objective fact. In making this inquiry, courts cannot stop at literalism. The literal words of challenged statements do not entitle a media defendant to pinion immunity or a libel plaintiff to go forward with its action. In determining whether speech is actionable, courts must additionally consider the impression created by the words used as well as the general tenor of the expression, from the point of view of the reasonable person. . . . In general, as previously observed, it is hard to conceive that any published statement could be without some factual grounding.. . . A media defendant surely has no license to misportray facts; false statements are actionable when they would be perceived as factual by the reasonable person. But statements must first be viewed in their context in

order for courts to determine whether a reasonable person would view them as expressing or implying *any* [sic] facts. Here, the defendants not only acted in disregard for the truth, they invented non-existent acts and published them, and did not do any research to determine any truth in their false allegations. They submitted no facts or disinterested witnesses at the trial or to the Appellate Division, or to the Court of Appeals, who could comment on their libelous, contrived statements. The acts were all invented. No one was kicked out, nothing happened before the school year started; all ninth-year students were admitted and allowed to graduate. Nothing happened in the last minute as the libelous statement claimed it did. Any bussing that did occur was in September, 1969, over a year after the April, 1968 resolution that was made in April, 1968.

Absolutely nothing was shown by defendants that it took the Port Chester school system over 10 years to recover from Mann destructive actions the statement was deliberately invented and false. No proof was shown by defendants that there was any destructive actions or that it took ten years to recover. The testimony of the Superintendent of School demonstrated, at trial, that absolutely nothing occurred that defendants alleged. The entire article was based on false, invented acts and the jury and lower courts all ruled in plaintiff favor.

Whether a statement is defamatory is first a matter for the Court, and here, the lower court, the jury, and the Appellate Division all ruled that the statement-article was defamatory.

In *Brooklyn Law School v. Aetna Case & Surey Co.*, 661 F.Supp. 445, Affirmed 849 F.2d 788, it was held that any communication, spoken or written, concerning an individual which tends to expose an individual to

public contempt, ridicule, or disgrace, or injure an individual in his profession is defamatory.

In *Trump v. Chicago Tribune Co.*, 616 F.Supp. 1424, it was held that when criticism takes the form of accusations of criminal or unethical conduct, or derogation between fact and opinion has been crossed, the speaker would be liable.

In *McManus v. MaCarthy*, 686 F.Supp. 302, it was held that words tending to disparage a person in his professional capacity by imputing to him professional misconduct, incompetence, ignorance or unfitness are libelous per se.

In *Held v. Pokorny*, 583 F.Supp. 1038, the court stated that under New York law, a writing is actionable without allegation or proof of special damages if it tends to disparage a person in the way of his office, profession or trade; such statements about attorneys include those which show lack of character or a total disregard of professional ethics. In *Reeves v. American Broadcasting Companies, Inc.*, 580 F. Supp. 84, aff 719 F.2d 602, it was held that a statement is defamatory per se if it tends to disparage a person in way of his office, profession or trade. It also held that statements to the press impugned integrity of corporate officers and raised serious questions of professional impropriety, the statements were defamatory per se, and pleading of special damages was unnecessary.

In *Grass v. News Group Publications, Inc.* 570 F.Supp. 178, the court stated that under New York law, statement or publication which concerned a person in his trade or business and tends to injure him is actionable per se.

The N.Y. Court of Appeals, notwithstanding that the above Federal cases were cited, set aside the jury verdict and the decisions of the lower courts and Appellate Division.

As the evidence showed, both the testimony of the Superintendent of Schools and the President of the Teachers Union at the times that plaintiff was on the School Board demonstrated that no such acts as defendants asserted ever existed. The allegations by defendants were false, invented and contrived, and the jury so found.

In *Carolco Pictures, Inc. v. Sirota*, 700 F.Supp. 169, the Court ruled that under New York law, the plaintiff burden of showing statement was spoken with malice, knowledge of falsity, or reckless disregard for the truth, to overcome common law qualified privilege claim in defamation action, did not have to be established by lear and convincing evidence.

Here, the true facts were reasonably available to defendants upon proper investigation, and thus the newspaper acted in a grossly irresponsible manner in publishing the libelous statements. In *Udell v. New York News, Inc.*, 507 N.Y.S.2d 904, 124 A.D.2d 656, app. dism. 519 N.Y.S.2d 967, 70 N.Y.2d 872, 518 N.E.2d 9, the Court said:

> . . . recovery may be had for defamatory opinions where, as here, the plaintiff is able to demonstrate the falsity of the facts underlying those opinions and thereby onvince the triers of fact that the factual disparities would affect the conclusions drawn by the average reader regarding the validity of the opinions expressed [citing cases].
>
> Similarly, the record supports a finding that the defendant New York News, Inc', (hereafter the News), cted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination

> ordinarily followed by responsible parties (*Chapadeau v. Utica Observer-Dispatch*, 38 N.Y.2d 196, 199, 379 N.Y.S.2d 61, 341 N.E.2d 569) in publishing the libelous statements The jury was entitled to rely upon the trial evidence indicating that the News had reason to doubt the accuracy of its sources and facts and that the true facts were easily accessible upon proper investigation [citing cases].

Here, the true facts were readily accessible to defendants; all they had to do was to read the records of the Board of Education. As the record shows, the Westmore News was established in 1964; not one issue of the Westmore News was proffered alluding to any of the acts set forth in their libelous article. As stated in the *Chapadeau* case, *supra*, . .the publisher acted in a grossly irresponsible manner without due consideration for the standards of information gathering and dissemination ordinarily followed by responsible parties. Here, the plaintiff established that, by a preponderance of evidence, as the jury found after trial, and as the Appellate Division affirmed, there was no license to make false factual accusations and thereby unjustly destroy an individual reputation, as the defendants have done. Each and every allegation made by defendants in their article was factually false and invented, and designed to harm the plaintiff.

As shown, the defendants have not alleged even one affirmative defense in their answer, a requirement under New York law, which the Court of Appeals failed to recognize, nor has any privilege been asserted in their answer, also a requirement, and in any event were questions for the trial Court. In the slander case of *Willover v. Martha Hill*, 72 N.Y. 36 (1878), the Court of

Appeals stated:

> [W]e apprehend that in actions of this description, circumstances in mitigation must be set up in the answer, in order to be admissible in evidence [citing cases].

Here, nothing was set up in the defendants answer.

In *Crane v. New York World Telegram Corp.*, 308 N.Y. 470, 126 N.E.2d 753, the Court of Appeals stated: plea of truth as a justification must be as broad as the alleged libel and must establish the truth of the precise charge therein [citing cases] Here, as stated, nothing was alleged in defendants answer regarding any affirmative defenses whatsoever.

In the case of *Burmeister v. DeLucia*, 263 N.Y. 315, the Court of Appeals stated: defendant, as a general rule, who has knowledge of a defense which he fails to plead, cannot avail himself of it upon the trial. *Taylor v. Spader*, 48 N.Y. 664. Here, all the above cases were cited to the New York Court of Appeals, and were given no consideration. And, as stated, the defendants did not state any affirmative defense in their answer, and in fact were barred from even asserting any defense to this action.

Here, the Appellate Division, in its Decision in this action stated: ontrary to the appellant contentions, the jury finding that the plaintiff was defamed, and that he was entitled to compensatory damages, could have been reached on a fair interpretation of the evidence (*see, Gross v. New York Times Co.*, 892 N.Y.2d 146; *Lolik v. Big V Supermarkets*, 86 N.Y.2d 744; *Iannoccone v. 21st Century MRI, P.C.*,8 A.D.3d 233;; *Grieco v. Galasso*, 297 A.D.2d 659, 747 N.Y.S.2d 120).

Conclusion

The petition for a writ of certiorari should be granted since the decision of the New York Court of Appeals is at complete variance to the decisions of the U.S. Supreme Court.

Respectfully Submitted,

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APPENDIX

Judgment – NY Court of Appeals
10 N.Y.3d 271, 885 N.E.2d 884 N.Y.,2008.
March 25, 2008

Monroe Yale Mann, Respondent

v.

Bernard Abel et al., Appellants, Defendants

Henry R. Kaufman, for appellants

Submitted by Monroe Yale Mann, for respondent.

Advance Publications, Inc. et al., amici curiae

PIGOTT, J.:

This action for libel arises out of an article published on August 22, 2003 in the Westmore News, an independent newspaper serving the Town of Rye. The newspaper's founder, defendant Bernard Abel, wrote the article as part of his regularly featured column called, "The Town Crier." The column is located in the opinion page of the newspaper and is identified by an editor's note that it represents the opinion of the author and "not necessarily that of this newspaper."

The article at issue, entitled "Borrelli on par with Marie Antoinette" (referring to Rye Town

Councilman Mike Borrelli), was written by Abel during a heated local election for control of the Rye Town Board. Under a subheading, entitled, "Who is the real Mann?", Abel wrote about plaintiff Monroe Yale Mann, the Rye Town Attorney. Abel described Mann as a "political hatchet Mann" and "one of the biggest powers behind the throne" in the Town of Rye government. Abel wrote that it appeared that "Mann pulls the strings" and questioned whether Mann was "leading the Town of Rye to destruction." The article identified Mann as playing an "instrumental" role in a decision by the Port Chester School board, some 35 years earlier, to discontinue its practice of allowing high school students from the Blind Brook School District to attend Port Chester High School.

Following publication, Mann commenced this against defendants Abel and Westmore News, Inc., alleging that the statements contained in the article were false and published with actual malice. Before engaging in discovery, defendants moved to dismiss the complaint, contending that the action was filed in bad faith to chill the exercise of protected free speech and that the suit was frivolous. Supreme Court denied the motion and the Appellate Division affirmed without addressing defendant's constitutional claim. Thereafter, Mann moved for summary judgment on the complaint. Defendants opposed the motion and cross-moved for summary judgment asserting that the article contained only expressions of opinion by Abel. Supreme Court denied both motions on the ground

that there were disputed issues of fact, and did not address whether the article constituted protected opinion. The parties were directed to proceed to trial.

At the conclusion of the trial, the jury found that the statements in the article were defamatory and that defendant Westmore News had published the statements either with the knowledge that they were false or in reckless disregard of their truth or falsity. The jury awarded Mann $75,000 in compensatory damages against Westmore News and punitive damages against both Westmore News and Abel in the amount of $15,000 each. Defendants appealed, arguing that the statements were constitutionally protected opinion. The Appellate Division upheld the jury's determination that Mann was defamed, and concluded that he was entitled to compensatory damages, albeit at a reduced amount. The court dismissed the punitive damages awards and ordered a new trial unless Mann stipulated to a reduction in the compensatory damage award against Westmore News. Defendants then appealed as of right on the basis of a substantial constitutional question. We now reverse on the grounds that the alleged defamatory statements constitute nonactionable statements of opinion as a matter of law.

Whether a particular statement constitutes an opinion or an objective fact is a question of law (see Rinaldi v. Holt, Rinehart & Winston, 42 NY2d 369, 381 [1977], cert denied 434 US 969 [1977]). Expressions of opinion, as opposed to assertions of fact, are deemed

privileged and, and no matter how offensive, cannot be the subject of an action for defamation (see Weiner v. Doubleday & Co., 74 NY2d 586, 593 [1989], cert denied 495 US 930 [1990], citing Steinhilber v. Alphones, 68 NY2d 283 [1986]). Distinguishing between opinion and fact has "proved a difficult task", but this Court, in furtherance of that endeavor, has set out the following factors to be considered:

> "(1) whether the specific language in issue has a precise meaning which is readily understood; (2) whether the statements are capable of being proven true or false; and (3) whether either the full context of the communication in which the statement appears or the broader social context and surrounding circumstances are such as to signal readers or listeners that what is being read or heard is likely to be opinion, not fact."

(Brian v. Richardson, 87 NY2d 46, 51 [1995], citing Gross v. New York Times Co., 82 NY2d 146, 153 [1993], quoting Steinhilber, 68 NY2d at 292 [internal quotations omitted]).

In Immuno AG. V. Moor-Jankowski, (77 NY2d 235 [1991]), we declined to adopt an analysis that would require courts first to search the article for particular factual statements and then to hold such statements actionable unless couched in figurative or hyperbolic language (id. at 254). Rather, we held that

"courts must consider the content of the communication as a whole, as well as its tone and apparent purpose" and in particular "should look to the over-all context in which the assertions were made and determine on that basis 'whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff." (Brian, 87 NY2d at 51, quoting Immuno, 77 NY2d at 254).

Applying that test to the facts of this case, we hold that, when viewed within the context of the article as a whole, a reasonable reader would conclude that the statements as issue were opinion. Although not dispositive, we note that the column was on the "opinion" page of the newspaper and accompanied by an editor's note that the article was an expression of opinion by the author. Moreover, the tenor of the column, including allegations that Mann was a "political hatchet Mann" who appeared to "pull [] the strings", clearly signals the reader that the piece is likely to be opinion, not fact. Likewise, the statement that Abel thought Mann's actions were "leading the Town of Rye to destruction" could not be anything but a statement of opinion. Although one could sift through the article and argue that false factual assertions were made by the author, viewing the content of the article as a whole, as we must, we conclude that the article constituted an expression of protected opinion and therefore, summary judgment should have been awarded to defendants (see Millus v.

Newsday, Inc., 89 NY2d 840 [1996]).

Accordingly, the order of the Appellate Division insofar as appealed should be reversed with costs, and the complaint dismissed in its entirety.

* * * * * * * * * * * * * * * * * *

Order, insofar as appealed from, reversed, with costs, and complaint dismissed in its entirety. Opinion by Judge Pigott. Chief Judge Kaye and Judges Ciparick, Graffeo, Read, Smith and Jones concur.

Decided March 25, 2008

Judgment –
NY Appellate Division, Second Department
37 A.D.3d 778, 830 N.Y.S.2d 586
N.Y.A.D. 2 Dept.,2007.
February 27, 2007

D14074
Y/mv

Argued January 30, 2007

HOWARD MILLER, J.P.
ROBERT A. SPOLZINO
DAVID S. RITTER
ROBERT A. LIFSON, JJ.

2005-11255 DECISION & ORDER

Monroe Yale Mann, respondent, v
Bernard Abel, et al., appellants, et al., defendants.

(Index No. 12180/03)

Henry R. Kaufman, P.C., New York, NY, for appellants.

Mann & Mann, LLP, Port Chester, NY (Carolyn H. Mann and Monroe Yale Mann, pro se, of counsel), for respondent.

In an action to recover damages for libel, the defendants Bernard Abel and Westmore News, Inc., appeal from a judgment of the Supreme Court, Westchester County (Jamieson, J.), entered November 4, 2005, which, upon the denial of that branch of their motion pursuant to CPLR 4401, made at the close of the plaintiff case, which was to dismiss the complaint insofar as asserted against them for failure to establish a prima facie case, and upon a jury verdict, is in favor of plaintiff and against the defendant Westmore News, Inc., in the principal sums of $75,000 for compensatory damages and $15,000 for punitive damages, and against the defendant Bernard Abel in the principal sum of $15,000 for punitive damages.

ORDERED that the judgment is reversed, on the facts and as an exercise of discretion, with costs, the claim for punitive damages is dismissed, and a new trial is granted on the issue of compensatory damages against the defendant Westmore News, Inc., only unless within 30 days after service upon the plaintiff of a copy of this decision and order, the plaintiff shall serve and file in the office of the Clerk of the Supreme Court, Westchester County, a written stipulation consenting to reduce the verdict as to compensatory damages as against the defendant Westmore News, Inc., from the sum of $75,000 to the sum of $15,000, and to the entry of an appropriate amended judgment; in the event the plaintiff so stipulates, then the

judgment, as so reduced and amended, is affirmed, without costs or disbursements.

Contrary to the appellants contentions, the jury finding that the plaintiff was defamed, and that he was entitled to compensatory damages, could have been reached on a fair interpretation of the evidence (*see Gross v New York Times co.*, 82 NY2d 146; *Lolik v Big V Supermarkets,* 86 NY2d 744; *Iannaccone v 21st Century MRI, P.C.*, 8 AD3d 233; *Grieco v Galasso*, 297 AD2d 659). However, there was no basis to award punitive damages. Furthermore, the amount of the compensatory damage award was excessive to the extent indicated herein (*see* CPLR 5501; *Iannoccone v. 21st Century MRI, P.C., supra; Grieco v. Galasso, supra.).* We note that the Supreme Court erred in awarding interest on the damage award from the date of the injury to the date of the verdict (*see Rupert v Sellers*, 65 AD2d 473, 489-490, *affd* 50 NY2d 881, 883, *cert denied* 449 US 901).

The appellants remaining contentions are without merit.

MILLER, J.P., SPOLZINO, RITTER and LIFSON, JJ., concur.

ENTER:
s/James Edward Pelzer
Clerk of the Court

Jury Findings of Fact Supreme Court of the State of NY, County of Westchester

SUPREME COURT OF THE STATE OF NEW YORK,
COUNTY OF WESTCHESTER

----------X

Special Verdict Sheet - Index No.: 141080/03

MONROE YALE MANN,

Plaintiff,

-against-

BERNARD ABEL, RICHARD ABEL,
JANANNE ABEL, and WESTMORE NEWS, INC.

Defendants.

----------X

Answer the following questions:

1. Was the statement or were the statements defamatory?

At least five jurors must agree on the answer to this question: YES.

2. Did the statement or the statements refer to the plaintiff?

At least five jurors must agree on the answer to this question: YES.

3. Did defendant, Bernard Abel publish the statement or statements?

At least five jurors must agree on the answer to this question: NO.

4. Did the defendant, Richard Abel publish the statement or statements?

At least five jurors must agree on the answer to this question: YES.

5. Did the defendant, Janine Abel publish the statement or statements?

At least five jurors must agree on the answer to this question: NO.

6. Did the defendant Westmore News, Inc. publish the statement or statements?

At least five jurors must agree on the answer to this question: YES.

7. Was the statement or were the statements false?

At least five jurors must agree on the answer to this question: YES.

8. Did defendant Bernard Abel make the statement or the statements either knowing that it was false or in reckless disregard of the truth or falsity of the statement or statements?

At least five jurors must agree on the answer to this question: YES.

9. Did defendant Richard Abel make the statement or statements either knowing that it was false or in reckless disregard of the truth or falsity of the statement or statements?

At least five jurors must agree on the answer to this question: YES.

10. Did defendant Jananne Abel make the statement or statements either knowing that it was false or in reckless disregard of the truth or falsity of the statement or statements?

At least five jurors must agree on the answer to this question: YES.

11. Did defendant Westmore News, Inc. make the statement or statements either knowing that it

was false or in reckless disregard of the truth or falsity of the statement or statements?

At least five jurors must agree on the answer to this question: YES.

12. With respect to each Defendant separately state the amount of compensatory presumed damages, if any, awarded to the plaintiff:

Bernard Abel: $0.00
Jananne Abel: $0.00
Richard Abel: $0.00
Westmore News, Inc.: $75,000

13. Is plaintiff entitled to punitive damages against defendant, Bernard Abel?

At least five jurors must agree on the answer to this question: YES

14. Is plaintiff entitled to punitive damages against defendant, Richard Abel?

At least five jurors must agree on the answer to this question: NO

15. Is plaintiff entitled to punitive damages against defendant, Jananne Abel?

At least five jurors must agree on the answer to this question: NO

16. Is plaintiff entitled to punitive damages against defendant, Westmore News, Inc.?

At least five jurors must agree on the answer to this question: YES

Special Verdict Sheet Index No. 14180/03

1. State the amount of punitive damages you award against defendant Bernard Abel: $15,000.

2. State the amount of punitive damages you award against defendant Westmore News, Inc.: $15,000

At least five jurors must agree on the answer to this question: YES

IV. Transcript of Original Article, *Westmore News*, Friday, August 22, 2003

THE TOWN CRIER: ***Borrelli on par with Marie Antoinette*** by Bernard Abel

Rye Town Councilman Mike Borrelli lives in Rye Brook next to Ward Castle, in his smaller castle. He seems insensitive to the elderly, veterans, widows and others just able to pay their home taxes. He has often said, f they cannot pay increases because of reval, let them take out mortgages, get a reverse mortgage, sell or move. As Borelli runs out to play golf, does he ever consider those poor, hard-pressed taxpayers? I think not. I would like to nominate Borrelli for the ah Humbug award of the year.

Who is the real Mann?

It is my opinion that one of the biggestpowers behind the throne in Rye Town is local longtime controversial politico and political hatchet Mann, who is also the highly paid town attorney. When Rye Town Supervisor Robert Morabito made his run for county clerk, Mann and family donated $7,000 in cash and services. It appears that Mann pulls the strings and Morabito and the puppet board jump. Why?

Mann had been a Republican but jumped ship. He is now a Democrat. Why?

When Mann was on the Port Chester School Board, he was the one most instrumental in kicking

out the Blind Brook School District kids from Port Chester High School. He did that just before the school year started. At the last minute the Blind Brook student were bussed to Valhalla High School. For the following few class years, the students were bussed to Mamaroneck High School. Finally, after Mann actions the Blind Brook school district built its own high school. Before Mann power play, the Blind Brook School District had been sending its students on tuition to Port Chester High School for 70 years. It took the Port Chester School System over 10 years to recover from Mann destructive actions. Will Rye Town ever recover from Monroe Mann? Is the power behind Morabito throne leading the Town of Rye to destruction? I think it is.

I had requested, under the Freedom of Information Law, information about who has rented at Crawford Park and Oakland Beach over the past year. Mann has refused to turn over this public record. What harm is there in letting the public know there are special deals? Is everyone treated equally? If there is nothing to hide, why not release the information? This is government information which I believe the public has a right to know. His government is putting your home and all the information about it on the internet. Your home is your castle and according to the town, it is to be put on the world wide web. But you cannot find out who rents at Crawford Park and Oakland Beach because you would be infringing on their privacy. Or is

because they don want the public to know the political favors that are being handed out?

I made an appeal of Mann controversial decision. The Town Board appointed themselves as an appeal board at the last public meeting, after the secular prayer was orated by Morabito. The board rubber stamped Mann decision. Evidently, the board did not even listen to their own prayer. So much for open government and separation of government and religion.

Open and transparent government is a necessity. A government of secrecy cannot be tolerated!!!

Editor Note: This column, written by Westmore News founder Bernard Abel represents his opinion and not necessarily that of this newspaper.

V. Transcript of Subsequent Article, *Westmore News*, Friday, March 28, 2008

PLAINTIFF NOTE: The entire original article from the *Westmore News* entitled, HE TOWN CRIER: Borrelli on par with Marie Antoinette dated August 22, 2003, was reprinted in its entirety in this Friday, March 28, 2008 issue of the Westmore News, three days after the NY Court of Appeal final verdict on March 25, 2008.

From Our Editor and Publisher
FREE SPEECH WINS, MANN LOSES
By Jananne and Richard Abel

After a 5-year battle, we feel personally and professionally vindicated by a Tuesday decision of the New York State Court of Appeals, the highest court of New York. The Court unanimously dismissed a libel action against the Westmore News for a column founder Bernard Abel wrote in 2003 about then Rye Town Attorney Monroe Mann.

In the column, reprinted here, Abel referred to Mann as a political hatchet Mann and one of the biggest powers behind the throne in Rye Town government. He also criticized Mann for playing an nstrumental role in the decision by the Port Chester Board of Education, some 35 years earlier, to discontinue its practice of allowing high school

students from the Blind Brook School District to attend Port Chester High School.

The Court ruled that the column contained non-actionable opinions and dismissed the case.

Judge Eugene F. Pigott, Jr. noted that the column appeared on the opinion page followed by an editor note stating that it contained the opinions of its author.

he tenor of the column, including allegations that Mann was a olitical hatchet Mann who appeared to ull the strings clearly signals the reader that the piece is likely to be opinion, not fact, Judge Pigott wrote. likewise, the statement that Abel thought Mann actions were eading the Town of Rye to destruction could not be anything but a statement of opinion. While Mann claimed that there were some incorrect statements of fact contained in the column, the Court held that ourts must consider the content of the communication as a whole, as well as its tone and apparent purpose and in particular hould look to the overall context in which the assertions were made and determine on that basis hether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff.

Applying that test to the facts of this case, we hold that, when viewed within the context of the article as a whole, a reasonable reader would conclude that the statements at issue were opinion, the decision concluded.

Because we and this newspaper have always

been proponents of free speech, this decision is all the more significant. In general, there is a natural conflict between government and the press. That conflict benefits the people. When government officials try to use their power to shut the press down, as was apparently done in this instance when Mann filed a lawsuit against Bernard Abel and the Westmore News in an attempt to stop the paper from publishing Abel column criticizing Rye Town government, it cannot be ignored.

We invited Abel to write a column in 2002 because he disagreed with our editorial opinion about revaluation, which the town was undertaking. While starting with revaluation, he began looking into town government in general, which had largely been ignored by the press for a number of years, and found a number of improprieties.

After months of Abel exposing town wrongdoing in his own Crier column, Town Attorney Mann filed his libel suit. We saw the case as a way to shut up he Town Crier and in effect stymie free speech. We also saw it as a personal attack on the newspaper. Well, in the long-term, it didn work. We have now been vindicated in court. However, we were previously vindicated in November when the voters overthrow the longtime Rye Town Democratic administration of which Mann was a part.

Abel uncovering of Rye Town improprieties gave opposing candidates fuel for their campaigns which led to the gradual downfall and finally the

massive defeat of the Morabito regime in November 2007.

When Mann commenced this action against Abel and the Westmore News, alleging that statements contained in an August 2003 column were false and published with actual malice, we moved to dismiss the complaint, ontending that the action was filed in bad faith to chill the exercise of protected free speech and that the suit was frivolous. The Supreme Court denied the motion and the Appellate Division affirmed without addressing our constitutional claim.

At the Supreme Court level, the case proceeded to trial. While we continued to vigorously argue that these were all protected opinions, the jury awarded Mann $75,000 in compensatory damages against Westmore News and against both Westmore News and Abel in the amount of $15,000 each. We appealed and the Appellate Division reduced the compensatory damages to $15,000 and dismissed the punitive damages but upheld the jury determination that Mann had been defamed. We could have paid the original damages or even the reduced sum set by the Appellate Court. However, we felt it important to fight this attack on free speech to the end. The fact that our attorney, Henry Kaufman of Manhattan, who was recommended by our libel insurance company, was able to get 11 news organizations to join the suit with an amici curiae brief urging the Court to dismiss the action shows how important this issue is to the media. Among those organizations are the Associated Press,

New York Times Company, Daily News, Newsday, Inc., and NYP Holdings, Inc., which publishes the New York Post, Gannett Co., Inc., the Hearst Corporation, Bloomberg News and the New York Press Association, of which the Westmore News is a member.

A free speech case such as this has not been heard by the highest court of New York in more than a dozen years, according to Kaufman.

The New York Daily News, which is being sued by a New York State Supreme Court judge for an opinion piece, plans to use this decision to support its defense.

Because we believe the media right and the people right to challenge government are paramount, we took our case to New York highest court and prevailed. We see this as a victory for the people as well as for the newspaper and ourselves.

115

(2)

Supreme Court, U.S.
FILED
JAN 5 - 2009
OFFICE OF THE CLERK

No. 08-595

In The

Supreme Court of the United States

MONROE YALE MANN,

Petitioner,

v.

BERNARD ABEL, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The New York Court Of Appeals

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does the Court lack jurisdiction to review this case because the judgment of the New York Court of Appeals, dismissing a public official's defamation complaint based on its holding that the statements at issue were non-actionable opinions as a matter of New York law, rests on an independent and adequate state constitutional ground?

CORPORATE DISCLOSURE STATEMENT

Respondent Westmore News, Inc. has no parent company and no publicly held company owns ten percent or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	5
I. The New York Court Of Appeals Relied On An Independent And Adequate State Constitutional Ground For Its Decision	6
II. Even If This Court Had Jurisdiction To Review The Case, The Petition Articulates No Basis For Granting The Writ	17
CONCLUSION	20
APPENDIX	App. 1

TABLE OF AUTHORITIES

Page

CASES

600 West 115th Street Corp. v. Von Gutfeld, 80 N.Y.2d 130 (N.Y. 1992) 13, 14

Bose Corp. v. Consumers Union of the United States, Inc., 466 U.S. 485 (1984) 7

Brian v. Richardson, 87 N.Y.2d 46 (N.Y. 1995) 15, 16

Crane v. New York World Telegram Corp., 308 N.Y. 470 (N.Y. 1955) 19

Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) 8

Gross v. New York Times Company, 82 N.Y.2d 146 (N.Y. 1993) 14

Immuno AG v. J. Moor-Jankowski, 74 N.Y.2d 548 (N.Y. 1989), *vacated and remanded*, 497 U.S. 1021 (1990) 8

Immuno AG v. J. Moor-Jankowski, 77 N.Y.2d 235 (N.Y.), *cert. denied*, 500 U.S. 954 (1991) ..... *passim*

Mann v. Abel, 12 A.D.3d 646 (N.Y. App. Div. 2d Dept. 2007) 4

Mann v. Abel, 9 N.Y.3d 915 (N.Y. 2007) 19

Mann v. Abel, 10 N.Y.3d 271 (N.Y. 2008) 5

Michigan v. Long, 463 U.S. 1032 (1983) 6, 13

Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

Millus v. Newsday, Inc., 89 N.Y.2d 840 (N.Y. 1996) 15, 17

New York Times Co. v. Sullivan, 376 U.S. 254 (1964) 5, 19

Rinaldi v. Holt, Rinehart & Winston, 42 N.Y.2d 369 (N.Y.), *cert denied*, 434 U.S. 969 (1977) 12

Steinhilber v. Alphonse, 68 N.Y.2d 283 (N.Y. 1986) 11

Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), *cert. denied*, 499 U.S. 961 (1991) 11

OTHER AUTHORITIES

N.Y. CPLR 5601(b)(1) 6

N.Y.S. Constitution, Article 1, §8 ..... *passim*

Robert D. Sack, *Sack on Defamation: Libel, Slander and Related Problems* (3d Ed. 2008) 12

STATEMENT OF THE CASE

Respondents are the political columnist, publisher, editor and corporate owner of the Westmore News, an independent weekly newspaper serving the Towns of Rye Brook and Port Chester in Westchester County, New York. Petitioner was the Town Attorney of the Town of Rye who, decades earlier, had also served on the Port Chester School Board. The allegedly defamatory statements appeared in a column entitled "The Town Crier," written by Respondent Abel, and published on the newspaper's clearly-identified "opinion" page. An "Editor's Note" at the bottom of the opinion page stated that the column "represent[ed] . . . [Appellant Abel's] opinion . . . " and "not necessarily that of this newspaper." Pet. App. 1a.

The "Town Crier" column at issue in the action was published on August 22, 2003, during a heated local election for control of the Rye Town Board, under the headline "Borelli on Par With Marie Antoinette." In his column, commenting solely on the official actions of local public officials, Abel roundly criticized several Town incumbents, including Borelli, who was a Rye Town Councilman; the Rye Town Supervisor; other members of the Rye Town Board; and Respondent, for what Abel viewed as political machinations and various public policy offenses. Pet. App. 15a-17a.

Employing metaphorical and hyperbolic language throughout, the column's opinionated conclusion, in regard to Petitioner, was that his actions as Town

Attorney, and his past policies as a member of the School Board, were "destructive." Under a subheading, entitled "Who is the real Mann?," Abel described Petitioner as a "political hatchet Mann" and "one of the biggest powers behind the throne" in the Town of Rye government. Abel also wrote that it appeared that "Mann pulls the strings" and questioned whether Mann was "leading the Town of Rye to destruction." *Id.*

Following publication, Petitioner commenced this action against Respondents, and the newspaper's two editors, alleging that the statements contained in the article were false and published with actual malice. Before engaging in discovery, Respondents moved to dismiss the complaint, contending that the action was filed in bad faith by Petitioner public official to chill the exercise of protected free speech and that the suit was frivolous. The trial judge denied the motion and the Appellate Division affirmed without addressing Respondents' constitutional claims. Thereafter, Petitioner moved for summary judgment on the complaint. Respondents opposed the motion and cross-moved for summary judgment asserting that the article contained only expressions of opinion by Abel. The trial judge denied both motions on the ground that there were disputed issues of fact, and did not address whether the article constituted protected opinion. The parties were directed to proceed to trial. Pet. App. 2a-3a.

At trial, evidence on five key statements, that Petitioner alleged to be factual and false, was submitted to the jury. The statements criticized Petitioner for (1) his admitted switch of party affiliation in order to retain his position as Town Attorney in a Democratic Town Administration; (2) his "most instrumental" role in admittedly supporting a policy adopted in the 1970's that severed the Port Chester and Blind Brook School Districts; (3) the alleged "last minute" timing and (4) the allegedly "destructive" effects, of the School District severance policy; and (5) his "behind-the-throne" exercise of political "power" that columnist Abel "think[s]" is "leading the Town of Rye to destruction."[1]

At the conclusion of the trial, the jury, which was never instructed to distinguish between actionable fact and protected opinion, found that statements in the article were false and defamatory and that defendant Westmore News had published the statements

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[1] At trial Respondents acknowledged that their column had inadvertently erred in describing two subsidiary facts: Petitioner's switch of party affiliation was not from Republican to Democrat, but from Republican to Conservative; and as to the district severance policy (supported by Petitioner 35 years earlier), while Respondents maintained that the timing of the severance was, relatively speaking, at the "last minute" and did cause serious dislocations, they acknowledged that the policy was in fact not approved "just before the school year started," but more than a year prior. Respondents argued that those two errors were not substantially false or cognizably defamatory and, in any event, that they had not published the minor erroneous facts with actual malice.

either with the knowledge that they were false or in reckless disregard of their truth or falsity. The jury awarded Petitioner $75,000 in compensatory damages against Westmore News and punitive damages against both Westmore News and Abel in the amount of $15,000 each. Respondents appealed, arguing that the statements were constitutionally protected opinions or subsidiary facts that were either not substantially false or, in any event, not published with actual malice. Pet. App. 10a-14a.

The Appellate Division upheld the jury's determination that Petitioner was defamed, and concluded that he was entitled to compensatory damages, albeit at a reduced amount. *Mann v. Abel*, 12 A.D.3d 646 (N.Y. App. Div. 2d Dept. 2007); Pet. App. 7a-9a. The court dismissed the punitive damages awards and ordered a new trial unless Petitioner stipulated to a reduction in the compensatory damage award, which he did, leaving in place only the reduced award against Westmore News. The Appellate Division's opinion never addressed Respondents' claim of constitutional protection for opinion. *Id.*

Respondents then appealed as of right, on the basis of "substantial constitutional questions" presented, Pet. App. 3a, contending that the Appellate Division had failed to apply New York's distinctive approach to distinguishing opinion protected under the New York Constitution from facts that may, under New York law, be made the subject of a defamation action. In the alternative, Respondents argued that the Appellate Division must have misapplied the

precedents under the First Amendment to the United States Constitution forbidding liability absent a proper finding of actual malice.

The Court of Appeals unanimously reversed on the sole ground that the allegedly defamatory publication constituted non-actionable opinion as a matter of New York law under governing Court of Appeals precedents. It therefore concluded that the lower courts had erred in permitting the case to proceed to trial, held that summary judgment should have been awarded to Respondents before trial, and dismissed the complaint in its entirety. *Mann v. Abel*, 10 N.Y.3d 271 (N.Y. 2008); Pet. App. 1a-6a.

In light of this ruling on state constitutional grounds, the Court of Appeals had no need to address Respondents' alternative ground for reversal based on Petitioner's failure to meet his heavy federal constitutional burden of proving that Respondents had published any false statement of fact with actual malice under the standards of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

REASONS FOR DENYING THE WRIT

The Petition seeks review of a decision of the New York Court of Appeals, which cited only state law precedents, on the ground that it allegedly got the facts wrong and purportedly conflicts with other state court decisions as well as a handful of federal trial court decisions applying New York law. There is

no contention that there is any division within the lower courts about the question presented, not to speak of division among the federal courts of appeals or state appellate courts. At best, Petitioner seeks review based on a fact-bound Petition from a decision that clearly rests on an independent and adequate state constitutional ground. *Michigan v. Long*, 463 U.S. 1032 (1983). Consequently, this Court lacks jurisdiction to review the decision below even if there were, otherwise, any substantial basis for granting the writ.

I. The New York Court Of Appeals Relied On An Independent And Adequate State Constitutional Ground For Its Decision

In this case, the New York Court of Appeals exercised its jurisdiction to review the judgment affirmed by the Appellate Division as an appeal "as of right," based on "substantial constitutional questions," under *N.Y. CPLR* 5601(b)(1). Respondents' successful Jurisdictional Statement to the Court of Appeals expressly argued that "a substantial constitutional question was directly presented regarding construction and application *of the state constitutional privilege for statements of opinion*."[2] (Emphasis added).

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[2] *See* excerpt from Respondents' Letter Comments of May 23, 2007 to the New York Court of Appeals, reproduced in Respondents' Appendix. In that letter brief Respondents took the

(Continued on following page)

Not only is it clear that the Court of Appeals exercised its jurisdiction to hear Respondents' substantial constitutional claims regarding protection for statements of opinion under the state constitution, but the conclusion is also unavoidable that its sole basis for dismissing the complaint rested on that Court's application of *Article 1, §8, N.Y.S. Constitution* to accord with what it has long viewed as the broader protection to statements of opinion provided under the state constitution than under the First Amendment.

In an unbroken line of decisions dating back to the case of *Immuno AG v. J. Moor-Jankowski*, 77

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position that the Court of Appeals was justified in retaining subject matter jurisdiction *on state law grounds* regarding Respondents' *state constitutional opinion defense*. In that same Jurisdictional Statement Respondents argued, in the alternative, that a second substantial constitutional question was presented "regarding construction and application of the federal constitutional privilege for any statements of fact not published with actual malice." The appeal was subsequently briefed on both state and federal grounds and Respondents did argue that, if the state opinion ground was not held to be dispositive as a matter of law, then the Court should comply with its federal constitutional obligation to "independently review" the "entire record" in order to determine whether the jury's finding of "actual malice," based on allegedly false factual statements, could pass First Amendment muster under *Bose Corp. v. Consumers Union of the United States, Inc.*, 466 U.S. 485 (1984). However, because its ultimate disposition of the case was *based solely on state constitutional protection for statements of opinion as a matter of law*, the Court of Appeals did not reach, or ever discuss, the separate federal constitutional basis for reversal Respondents had argued.

N.Y.2d 235, *cert. denied*, 500 U.S. 954 (1991) (*Immuno II*), the N.Y. Court of Appeals has clearly announced its determination to protect statements of opinion more broadly under *Article I, §8* of the *N.Y. State Constitution* than under the First Amendment. The Court's analysis of the relative scope of state and federal constitutional protection for opinion was occasioned by this Court's decision to vacate and remand the Court of Appeals' original decision in *Immuno*, 74 N.Y.2d 548 (N.Y. 1989) (*Immuno I*), for reconsideration in light of *Milkovich v. Lorain Journal Co.*, 497 U.S. 1 (1990).

In *Milkovich*, as the Court of Appeals later characterized, this Court had "put[ ] an end to the perception – as it turns out, misperception – traceable to dictum in Gertz v Robert Welch, Inc. (418 U.S. 323, 339-340) that, in addition to all other Federal constitutional protections, there is a 'wholesale defamation exemption for anything that might be labeled 'opinion.'" 77 N.Y.2d at 242. However, in *Immuno I*, operating at least in part on the *Gertz* dictum that *Milkovich* later rejected, the Court of Appeals had dismissed a defamation action on the ground that statements in a letter to the editor of a scientific journal were "the letter writer's statements of opinion . . . entitled to the absolute protection of the State and Federal constitutional free speech guarantees." *Id.* at 239.

On remand after *Milkovich*, the Court of Appeals was called upon to assess whether it "would adhere to [its] original determination that defendant's summary

judgment motion was properly granted and the complaint dismissed" and it ultimately did so, expressly "premising [its] decision on independent State constitutional grounds." 77 N.Y.2d at 240.[3]

Citing New York's status as "a cultural center for the Nation," its long tradition of "provid[ing] a hospitable climate for the free exchange of ideas," and the "expansive language of the State constitutional guarantee," the Court expressly chose to accord greater protection to statements of opinion under *Article I, §8* which, it held, "reflect[ed] the deliberate choice of the New York State Constitutional Convention not to follow the language of the First Amendment, ratified 30 years earlier, but instead to set forth our basic democratic ideal of liberty of the press in strong affirmative terms." *Id.* at 249.

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[3] In *Immuno II*, the Court's majority opinion undertook a "dual constitutional analysis," reviewing its prior determination under both federal and state constitutional law, "in compliance with the Supreme Court's direction on remand." *Id.* at 242. The Court's "further consideration in light of *Milkovich*," led the majority to conclude that the federal constitution supported its affirmance of summary judgment on grounds of protection for opinion. Under its state constitutional analysis the Court also concluded that summary judgment was warranted, with the majority holding that the state constitution "furnishes the operative standard in this State for separating actionable fact from protected opinion." *Id.* at 252. The majority declined to accept the positions of concurring judges that the Court should have limited itself to a federal constitutional analysis or to a state common law approach. *Id.* at 265 n.6.

As the Court of Appeals therefore reasoned and clearly articulated in *Immuno II*:

> "Had defendant initially presented the issue as one of independent State constitutional law, instead of as an undenominated argument premised on the assumed identity of State and Federal law, it might have been resolved on that basis a year ago. The intervening occurrence of Milkovich, however, does not cause us to change our explicit conclusion that the case was correctly analyzed and decided in accordance with the core values protected by the State Constitution." *Id.*
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> * * *
>
> "We therefore proceed to resolve this case independently as a matter of State law, concluding that – as we previously held in Immuno – the standard articulated and applied in Steinhilber furnishes the operative standard in this State for separating actionable fact from protected opinion." *Id.* at 252.

Proceeding to define its independent state law view of constitutional protection for statements of opinion, under *Article I, §8*, and in contrast to its understanding of the potential implications of what it viewed as this Court's narrower approach to protecting opinion in *Milkovich*, the Court of Appeals held that in order

> "to determine whether the reasonable reader would have believed that the challenged statements were conveying facts about the libel plaintiff – we believe that an analysis

> that begins by looking at the content of the whole communication, its tone and apparent purpose (*Steinhilber v Alphonse*, 68 NY2d, at 293, supra) better balances the values at stake than an analysis that first examines the challenged statements for express and implied factual assertions, and finds them actionable unless couched in loose, figurative or hyperbolic language in charged circumstances. * * * But statements must first be viewed in their context in order for courts to determine whether a reasonable person would view them as expressing or implying any facts." *Id.* at 254.

Again contrasting its independent state law view to this Court's view in *Milkovich*, the Court of Appeals stated:

> "Our State law analysis of the remainder of the letter, however, would not involve the fine parsing of its length and breadth that might now be required under Federal law for speech that is not loose, figurative or hyperbolic (see, e.g., Unelko Corp. v Rooney, 912 F2d 1049 [9th Cir]). Isolating challenged speech and first extracting its express and implied factual statements, without knowing the full context in which they were uttered, indeed may result in identifying many more implied factual assertions than would a reasonable person encountering that expression in context." *Id.* at 254-55.

In sum, the Court of Appeals' expressly stated state law concern was to avoid any "hypertechnical

parsing of a possible 'fact' from its plain context of 'opinion,'" that might be the result of the federal analysis under *Milkovich* and that the Court of Appeals feared would "lose[ ] sight of the objective of the entire exercise, which is to assure that – with due regard for the protection of individual reputation – the cherished constitutional guarantee of free speech is preserved." *Id.* at 256.

It therefore held, in reaffirming its previous judgment dismissing the defamation complaint on state constitutional grounds, "that an approach that takes into account the full context of challenged speech, as previously set forth in Immuno and Steinhilber, accords with the central value of assuring 'full and vigorous exposition and expression of opinion on matters of public interest.' (Rinaldi v Holt, Rinehart & Winston, 42 NY2d 369, 384, cert denied 434 U.S. 969.)" *Id.*

Since *Immuno II*, it has been clear that the preferred, and now operative, standard for the constitutional protection of statements of opinion in New York derives from the Court of Appeals' independent state law analysis, premised on the understanding of a reasonable reader, based on context rather than on a threshold parsing of "fact" from "opinion," which *Immuno II* had characterized as the centerpiece of a likely federal analysis under *Milkovich*.[4]

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[4] For a brief but authoritative review of New York's state constitutional opinion jurisprudence, post-*Milkovich*, *see* Robert D. Sack, *Sack on Defamation: Libel, Slander and Related*

(Continued on following page)

In *600 West 115th Street Corp. v. Von Gutfeld*, 80 N.Y.2d 130 (N.Y. 1992), the next opinion case decided by the New York Court of Appeals, the defendant contended that his allegedly defamatory statements, made in opposition to a proposed building permit in the context of a heated public hearing conducted by a New York City Community Board, were constitutionally protected opinions. Just one year after *Immuno II*, the defendant expressly asserted his opinion defense under both the state and federal constitutions. Therefore, the Court of Appeals, following the pattern also set in *Immuno II*, proceeded to analyze the constitutional claim based on both state and federal law, specifically holding that the statements at issue were protected under both state and federal law, *citing Michigan v. Long*, 463 U.S. 1032 (1983).

Noting "this Court perceives the protection afforded by the First Amendment of the United States Constitution and that afforded by Article I, § 8 of the New York Constitution to be quite different," *id.* at 136, the Court found "Our determination that the order must be reversed rests on our conclusion that defendant's statements cannot be construed to allege facts under either analysis." *Id.*

Although the Court of Appeals in *600 West 115th Street* expressly applied both the federal and state constitutional analyses, the Court did reiterate its

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Problems (3d Ed. 2008), §4.2.4.4 at 4-25 – 4-26 and n.73 (collecting post-*Immuno II* New York cases).

preference for the broader state constitutional analysis that was

> "[d]esigned to avoid 'the fine parsing . . . that might now be required under Federal law' (id., at 255), the State law approach was viewed as better able to 'assure that – with due regard for the protection of individual reputation – the cherished constitutional guarantee of free speech is preserved.'" *Id.* at 145, *citing Immuno II* at 256.

Since *Immuno II* and *600 West 115th Street*, however, the Court of Appeals has eschewed any further dual federal and state analysis in the handful of subsequent cases that have presented the issue of constitutional protection for statements of opinion.

In *Gross v. New York Times Company*, 82 N.Y.2d 146 (N.Y. 1993), the Court of Appeals denied a motion to dismiss a defamation action addressed to a series of investigative news reports, premised on a defense of constitutional protection for opinion. However, it restated and reaffirmed that "this Court has . . . under our own State Constitution . . . embraced a test for determining what constitutes a nonactionable statement of opinion that is more flexible and is decidedly more protective of 'the cherished constitutional guarantee of free speech.'" 82 N.Y.2d at 152. It again contrasted what the Court has viewed as the narrower federal approach, "we stress once again our commitment to avoiding the 'hypertechnical parsing' of written and spoken words for the purpose of identifying 'possible "fact[s]"' that might form the basis of a sustainable libel action," *citing Immuno II*. *Id.* at 156.

In *Brian v. Richardson*, 87 N.Y.2d 46 (N.Y. 1995), the Court of Appeals affirmed dismissal of a defamation claim addressed to an "Op Ed" in the New York Times by the former Secretary of State. Clearly applying its preferred state law approach, the Court held that the column "made it sufficiently apparent to the reasonable reader that its contents represented the opinion of the author," *id.* at 54. It expressly applied the *Immuno II* analysis of the immediate and broader social context, as opposed to any narrower federal approach, rejected on state constitutional grounds in *Immuno II*, "that would first search a publication for specific factual assertions and then hold those assertions actionable unless they were couched in figurative or hyperbolic language." *Id.* at 51.

And in *Millus v. Newsday, Inc.*, 89 N.Y.2d 840 (N.Y. 1996), the Court of Appeals' most recent decision on the issue of opinion until the case at bar, the Court affirmed the trial court's grant of summary judgment, again focusing on the central state constitutional considerations of *Immuno II*, as reiterated in *Brian*, of context and the understanding of the reasonable reader. It concluded that, "[w]hen viewed within the context of the editorial as a whole . . . a reasonable reader would conclude that the statement at issue is an opinion." 89 N.Y.2d at 842.

Finally, and consistent with this entire line of precedent, it is evident that the decision in this case represents the current culmination and further application of the Court of Appeals' independent state law view of the appropriate analysis for distinguishing

between unprotected factual statements and constitutionally-protected statements of opinion. As analyzed in the Court below, the state constitutional analysis was clearly the one and only basis for the Courts of Appeals' decision in this case.

Thus, focusing on the central state constitutional factor of context, and citing *Brian*'s reliance on *Immuno II*, the Court once again noted that in *Immuno II* it had "declined to adopt an analysis [i.e., *Milkovich*] that would require courts first to search the article for particular factual statements and then to hold such statements actionable unless couched in figurative or hyperbolic language (id. at 254)."

Then, proceeding to apply the *Immuno II* state constitutional, context-driven, "test to the facts of this case," 10 N.Y.3d at 277, the Court held that, "when viewed within the context of the article as a whole, a reasonable reader would conclude that the statements at issue were opinion."

Finally, although it did not expressly cite *Milkovich*, the Court of Appeals concluded by echoing its own by now oft-stated rejection of what it has viewed as the undesirable potential for "hypertechnical parsing" of "fact" from "opinion" under the federal *Milkovich* analysis. It therefore concluded that,

> "[a]lthough one could sift through the article and argue that false factual assertions were made by the author, viewing the content of the article as a whole, as we must, we conclude that the article constituted an

> expression of protected opinion and therefore, summary judgment should have been awarded to defendants (see Millus v Newsday, Inc. [citation omitted])." *Id.*

In other words, in the decision below there is no longer even a hint of any dual state/federal analysis of the kind which the Court of Appeals was careful to articulate and acknowledge in *Immuno II* and *600 West 115th Street*, in the immediate aftermath of the *Milkovich* remand. The Court below cited neither *Milkovich* nor any other federal constitutional precedent, confining itself to the New York case law, concerns, terminology and typology of its state constitutional analysis and its post-*Milkovich* state precedents emanating from *Immuno II*.

In sum, the decision below clearly rests on an independent and adequate state law ground under *Article I, §8* of the *N.Y.S. Constitution* and this Court is without jurisdiction to review it.

II. Even If This Court Had Jurisdiction To Review The Case, The Petition Articulates No Basis For Granting The Writ

Petitioner has articulated no basis for concluding that a different result in this case would have been mandated under a federal First Amendment analysis, either on the issue of constitutional protection for opinion or on the issue of his failure to prove a fact-based case of substantial falsity and actual malice.

Accordingly, even if this Court were to conclude that it has jurisdiction to review the Court of Appeals' decision, the Petition in any event presents no issue warranting review on certiorari.

In addition, the Petition should be denied because the questions it addresses are largely confined to application of settled New York common law and New York case law to the purported facts of the case and the Petition thus raises no issues of general importance, nor is there any suggestion of a split in the Circuits on any issue Petitioner has attempted to raise.

Moreover, the Petition also grossly – indeed quite shamelessly – misrepresents the facts and prior proceedings in the case and, for this reason alone, should be denied.

As but one example, Petitioner represents to this Court that "Defendants never raised any issue in the lower Court . . . regarding any defense under the Constitution, either in their papers or at trial," Pet. 6. Yet the unanimous Court of Appeals had noted that:

> "Before engaging in discovery, defendants moved to dismiss the complaint, contending that the action was filed in bad faith *to chill the exercise of protected free speech* and that the suit was frivolous. Supreme Court denied the motion and the Appellate Division *affirmed without addressing defendants' constitutional claim*. Thereafter, Mann moved for summary judgment on the complaint. Defendants opposed the motion and cross-moved

> for summary judgment *asserting that the article contained only expressions of opinion* by Abel. Supreme Court denied both motions on the ground that there were disputed issues of fact, and *did not address whether the article constituted protected opinion*." Pet. App. 2a-3a (emphasis added).

Although he evidently now purports to suggest that the Court of Appeals misrepresented or misapprehended the issues raised in the lower courts, Petitioner made no motion in the Court of Appeals for rehearing or reargument, on any basis, including its alleged misstatement of the factual record. Petitioner also neglects to advise this Court that he had previously moved to dismiss the appeal on the ground that no constitutional issues had been raised in the lower courts, but that motion was also denied by the Court of Appeals. 9 N.Y.3d 915 (N.Y. 2007).

Finally, on its face the Petition grossly misstates and misunderstands the modern constitutional law of defamation, *inter alia* citing defunct case law dating back prior to *New York Times Co. v. Sullivan*, 376 U.S. 274 (1964). *See, e.g.*, Pet. 15 (*citing Crane v. New York World Telegram Corp.*, 308 N.Y. 470 (N.Y. 1955) (defining the inapposite pre-*Sullivan* requirements for a defamation defendant's "plea of truth as justification").

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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RESPONDENTS' APPENDIX

(Excerpted from Respondents' [Appellants in the Court Below] Comments on Subject Matter Jurisdiction to N.Y. Court of Appeals, May 23, 2007, Page 6)

Substantiality and Merit of the Constitutional Questions Presented

Appellants respectfully submit that the case here for application of the pivotal and well-established constitutional limitations on public official defamation actions, as required under applicable state and federal constitutional provisions, is clear and overwhelming notwithstanding the Second Department's complete and inexplicable failure to recognize, address or properly construe and apply those unavoidable constitutional requirements.

– *A Substantial Constitutional Question is Directly Presented Regarding Construction and Application of the State Constitutional Privilege for Statements of Opinion*: Before the Appellate Division could have affirmed the Amended Judgment it must have found, although it did not in any way discuss or explain this implicit finding, that Respondent met his burden of demonstrating publication of one or more false and defamatory "factual assertions" about him with the requisite degree of fault. *Immuno AG* v. *Moor-Jankowski*, 77 N.Y.2d 235, 245, *cert. denied*, 500 US 954 (1991), *as cited in*, *Prozeralik* v. *Capital Cities Communications, Inc.*, 82 N.Y.2d 466, 473 (1993). Before the Second Department could properly have

affirmed the Judgment it must also have found, although it did not discuss or explain this finding either, that the jury's verdict did not punish protected statements of opinion in addition to any arguably actionable statements of fact. These implicit findings directly and necessarily presented a substantial constitutional question because there is no alternative, non-constitutional ground for otherwise upholding a verdict of defamation liability as to such statements.

The fundamental standards and general contours of the constitutional privilege for statements of opinion are well-established. In an unbroken series of defamation cases, dating back more than twenty years, this Court has developed a consistent line of authority mandating thoroughgoing and effective constitutional protection for statements of opinion. In *Steinhilber* v. *Alphonse*, 68 N.Y.2d 283, 289 (1986), this Court protected statements of "pure opinion" relying on First Amendment precedent. *See also Rinaldi* v. *Holt, Rinehart & Winston*, 42 N.Y. 2d 369, 380 (1977). Later, beginning with *Immuno AG*, *supra*, this Court expressed concern that the First Amendment as applied to statements of opinion by the U.S. Supreme Court may afford "insufficient protection . . . to central values protected by the law of this State." For that reason the Court staked out a new and independent state constitutional privilege, under Article I, Section 8 of the New York Constitution, and the Court has developed methods of analysis to identify and protect opinion even more broadly than

under the First Amendment. *See also*, *600 West 115th Street Corp.* v. *Von Gutfeld*, 80 N.Y.2d 130 (1992) (hyperbolic accusations held non-actionable in context as protected opinions); *Brian* v. *Richardson*, 87 N.Y.2d 46 (1995) (newspaper editorial held non-actionable despite suggestions of criminality).